STATE OF ALASKA

IBLA 87-232 Decided June 22. 1989

Appeal from a decision of the Alaska State Office, Bureau of Land Management, reversing an earlier decision in part, holding Native allotment application A-058325 for approval, and rejecting State of Alaska selection application A-051107 in part.

Affirmed as modified.

1. Alaska: Native Allotments--Alaska National Interest Lands Conservation Act: Duty of Department of the Interior to Native Allotment Applicants

   Sec. 905(a)(1) of ANILCA, 43 U.S.C. § 1634(a) (1982), approved, subject to valid existing rights and certain exceptions, all Native allotment applications which were pending before the Department on or before Dec. 18, 1971. Pursuant to Pence v. Kleppe, 529 F.2d 135 (9th Cir. 1976), if a Native allotment applicant is rejected, and the rejection is based on factual issues, the applicant must be granted an opportunity for an oral hearing before a trier of fact before a decision to reject an allotment application can be considered to be final. In such case the application should be reinstated and considered to be pending on Dec. 18, 1971.

2. Alaska: Native Allotments--Alaska: Statehood Act--Alaska National Interest Lands Conservation Act: Duty of Department of the Interior to Native Allotment Applicants--Alaska National Interest Lands Conservation Act: State Selections--Alaska National Interest Lands Conservation Act: Valid Existing Rights

   Sec. 905(a)(1) of ANILCA, 43 U.S.C. § 1634(a) (1982), approved, subject to valid existing rights and certain exceptions, all Native allotment applications which were pending before the Department on or before Dec. 18, 1971. One of these exceptions, which is found at

sec. 905(a)(4) of ANILCA, 43 U.S.C. § 1634(a)(4) (1982), provides that when an allotment application describes land which on or before Dec. 18, 1971, was validly selected by the State of Alaska pursuant to the Alaska Statehood Act it shall be adjudicated pursuant to the requirements of the Act of May 17, 1906, as amended. The filing of a homestead entry application segregates the land from all State selection. The filing of an acceptable application for a Native allotment also segregates the land, and a subsequent State application for all available lands, not accompanied by a showing that the applicant for allotment has permanently abandoned occupancy of the land, will create no rights as to the lands subject to the Native allotment application.

3. Alaska: Native Allotments--Alaska: Statehood Act--Alaska National Interest Lands Conservation Act: Duty of Department of the Interior to Native Allotment Applicants--Alaska National Interest Lands Conservation Act: State Selections--Alaska National Interest Lands Conservation Act: Valid Existing Rights

Sec. 906(e) of ANILCA, 43 U.S.C. § 1635(e) (1982), permits the State to file State selection applications and amendments thereto, and to refile existing applications to include lands not available for selection under the Alaska Statehood Act when the application is filed. The "top filed" lands will become subject to the selection effective the date the lands become available within the meaning of the Alaska Statehood Act. A State selection made by refiling an existing State selection application incorporates only those additional lands which become available for selection within the meaning of the Alaska Statehood Act on or after the date the selection application is refiled.

4. Alaska: Native Allotments--Alaska National Interest Lands Conservation Act: Duty of Department of the Interior to Native Allotment Applicants

When an applicant has filed a Native allotment application prior to Dec. 18, 1971, and BLM has rejected the application, but did not afford an opportunity for a hearing, the reinstated application should be considered as pending on Dec. 18, 1971. Such Native allotment applications are subject to the legislative conveyance provision of sec. 905 of ANILCA if there is no basis for a finding that, by reason of an exception to the legislative conveyance, the application must be adjudicated pursuant to the requirements of the Act of May 17, 1906, as amended.

APPEARANCES: Lance B. Nelson, Esq., Office of the Attorney General, State of Alaska, Anchorage, Alaska, for appellant; Mark Regan, Esq., Anchorage, Alaska, for Hazel L. Barlip; Bruce E. Schultheis, Esq., Office of the Regional Solicitor, U.S. Department of the Interior, Anchorage, Alaska, for the Bureau of Land Management.

OPINION BY ADMINISTRATIVE JUDGE MULLEN

The State of Alaska has appealed from an October 9, 1986, decision of the Alaska State Office, Bureau of Land Management (BLM), reversing a December 17, 1975, BLM decision in part, holding Native allotment application A-058325 for approval, and rejecting State selection application A-051107 in part.

The facts in this case are somewhat convoluted, and will therefore be set out in detail. The first event having bearing on this case occurred on August 11, 1959, when Hazel L. Barlip (Barlip), then known as Hazel Nudlash, filed a homestead entry application for the SE^, sec. 22, T. 5 S., R. 13 W., Seward Meridian. Her application was filed pursuant to the homestead laws, and was assigned serial number A-049990. 1/

On January 27, 1960, the State of Alaska filed general purposes grant selection application A-051107. 2/ In its application Alaska sought title to all vacant, unappropriated, and unreserved lands in T. 5 S., R. 13 W., Seward Meridian, Alaska. On August 16, 1962, the State of Alaska amended application A-051107 to include all lands in T. 5 S., R. 13 W., Seward Meridian, subject to valid existing rights, claims, or patented lands.

On November 19, 1962, the Bureau of Indian Affairs filed a Native allotment application pursuant to section 1 of the Act of May 17, 1906, as amended (Allotment Act) 3/ on behalf of Barlip. 4/ This application described the same 160 acres of land in the SE^, sec. 22, T. 5 S., R. 13 W., Seward Meridian, Alaska, Barlip had described in homestead entry application No. A-049990. 5/ On September 17, 1968, Barlip filed evidence of

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1/ Section 702 of the Federal Land Policy and Management Act of 1976, P.L. 94-579, 90 Stat. 2787, repealed the homestead laws effective Oct. 21, 1976, except with respect to Alaska, where such repeal became effective Oct. 21, 1986.

2/ The State's application was filed pursuant to section 6(b) of the Alaska Statehood Act of July 7, 1958 (48 U.S.C. ch. 2, | 6(b) (1982)).

3/ 43 U.S.C. || 270-1 through 270-3 (1970). This act was repealed by section 18(a) of the Alaska Native Claims Settlement Act, 43 U.S.C. | 1617(a) (1982), on Dec. 18, 1971, subject to pending applications.

4/ The name of the applicant appearing on this application was also Hazel L. Nudlash. It appears that the applicant subsequently married, and Hazel L. Barlip is her married name.

5/ The original Native allotment application described the land as being in "T. 55, R. 13 W.," and did not contain sufficient information to identify the location of the lands sought. In an amended application, filed on Apr. 11, 1963, the application was amended to describe land in T. 5 S., R. 13 W.

use and occupancy of the land, claiming use from 1959 for gardening and berrypicking.

On April 24, 1964, BLM wrote to Barlip advising her that BLM's records indicated that she had filed a homestead entry and a Native allotment application for the same parcel of land, and that, if she did not file a relinquishment of the homestead entry application, her Native allotment application would be rejected. On May 15, 1964, Barlip filed a relinquishment of homestead entry No. A-049990, and the case file for her homestead entry was closed.

By decision dated December 17, 1975, BLM approved Barlip's Native allotment application as to 40 acres in S\ NE^ SE^, N\ SE^ SE^, sec. 22, T. 13 N., R. 5 W., Seward Meridian, but rejected the application as to the remaining 120 acres, based on the absence of evidence of substantial use and occupancy, which is required by section 3 of the Allotment Act. The decision also advised Barlip of her right to appeal to this Board. No appeal was filed by or on behalf of Barlip.

After some delay, on May 18, 1977, BLM issued a decision correcting the December 17, 1975, decision by amending the description of the lands approved for conveyance from "T. 13 N., R. 5 W." to "T. 5 S., R. 13 W." On August 26, 1977, Certificate of Allotment No. 50-77-0123 was sent to Barlip. This certificate conveyed 40 acres in the S\ NE^ SE^ and the N\ SE^ SE^, sec. 22, T. 5 S., R. 13 W., Seward Meridian, Alaska, to Barlip.

On January 2, 1979, the State filed a further amendment to selection application A-051107, to include "all unpatented lands" in the township. On May 12, and June 1, 1981, the State filed a notice pursuant to the provisions of section 905 of the Alaska National Interest Lands Conservation Act (ANILCA), 94 Stat. 2371, advising BLM that Barlip's Native allotment application covered lands which had been selected by the State and advising BLM of the State's opinion that Barlip's application must be adjudicated pursuant to the requirements of the Allotment Act.

On June 17, 1981, BLM notified Barlip that it had reinstated her application. The record contains no statement of the reason for reinstatement, but it can be assumed that reinstatement was as a direct result of the decision in Pence v. Kleppe, 529 F.2d 135 (9th Cir. 1976). In Pence the court held that Native allotment applicants must be granted an opportunity for an oral hearing before a trier of fact before a decision to reject an allotment application can be considered to be final. See id. at 143. Barlip was entitled to reinstatement of her application as to the 120 acres previously rejected because she had not been afforded the opportunity to present evidence of use and occupancy before a trier of fact. 6/

6/ A limited exception to this requirement exists when there is no issue of fact requiring a hearing. See William M. Tennyson, Jr., 66 IBLA 38 (1982).

The case file for State selection A-051107 was not sent with the appeal. However, the case file before us contains a case file abstract of that State application. The abstract indicates that on August 17, 1981, the State "top filed" pursuant to ANILCA.

On December 17, 1981, the Alaska State Office, BLM issued a decision summarily dismissing the State's June 1, 1981, protest of Barlip's Native allotment application because the State had not stated that the land described in the application was the situs of improvements or was necessary for public access. A similar decision was issued on January 18, 1982, dismissing the State's May 12, 1981, protest. On February 25, 1982, the State again top filed under ANILCA. On June 30, 1982, the State notified BLM that it was withdrawing its protest of the Barlip application.

[1] Section 905(a)(1) of ANILCA, 43 U.S.C. § 1634(a) (1982), approved, subject to valid existing rights and certain exceptions, all Native allotment applications which were pending before the Department on or before December 18, 1971. We now turn to the question of whether Barlip's application was pending on December 18, 1971.

As previously noted, in Pence v. Kleppe, supra, the court held that Native allotment applicants must be granted an opportunity for an oral hearing before a trier of fact before a decision to reject an allotment application can be considered to be final. See id. at 143; see also note 6. In Olympic v. United States, 615 F. Supp. 990 (D. Alaska 1985), the court addressed facts similar to those now before us. In that case, Olympic's father filed a Native allotment application in 1960. BLM rejected his application in 1967. In 1975, the appellant in the Olympic case requested reinstatement of the application. BLM denied her request and the BLM decision was affirmed by this Board. See Mary Olympic, 47 IBLA 58 (1980), and Mary Olympic (On Reconsideration), 65 IBLA 26 (1982). The court noted that section 905(a) of ANILCA provided for legislative conveyance of certain Native allotments. Citing the legislative history of section 905 of ANILCA, the court found that Olympic's application should have been reinstated, and further found that the reinstated application should be considered as pending on December 18, 1971.

Barlip had not been afforded an opportunity to present evidence of use and occupancy before a trier of fact following either the 1975 or the 1977 decision rejecting her claim to the additional 120 acres. Barlip was therefore entitled to reinstatement of her application as to the 120 acres previously rejected. Therefore, the decision rejecting Barlip's application was not final on December 18, 1971. If the decision was not final, we must consider her application to have been pending on that date. In accordance with the holdings in the Pence and Olympic cases, we find that Barlip's Native allotment application was pending on December 18, 1971.

[2] Having found that Barlip's Native allotment application was pending on December 18, 1971, we will examine whether, under section 905(a)(1) of ANILCA, her allotment was congressionally approved. As previously noted, Congress provided exceptions to this provision. One of these exceptions, which is found at section 905(a)(4) of ANILCA, 43 U.S.C.

§1634(a)(4) (1982), provides that: "[W]here an allotment application describes land * * * which on or before December 18, 1971, was validly selected by * * * the State of Alaska pursuant to the Alaska Statehood Act * * * [it] shall be adjudicated pursuant to the requirements of the Act of May 17, 1906, as amended." See also State of Alaska, 85 IBLA 196 (1985).

We must now determine whether the State of Alaska had selected the lands subject to the Barlip application on or before December 18, 1971. To answer this question, we will examine the land status at the time Alaska filed its application and at the time it filed each of its various amendments to that application.

The State application was filed on January 27, 1960, which was subsequent to August 11, 1959, the date Barlip had filed her homestead entry application. The filing of a homestead entry application segregates the land selected from all forms of entry, including State selection. 43 CFR 76.12 (1962); 43 CFR 2091.1; Schraier v. Hickel, 419 F.2d. 663, 665-67 (D.C. Cir. 1969); Albert A. Howe, 26 IBLA 386, 387-88 (1976) (and cases cited). The State selection application was for vacant, unappropriated, and unreserved lands, and thus did not cover the lands subject to Barlip's homestead entry.

The State amended its application on August 16, 1962, but at that time the lands remained segregated from State selection by the August 11, 1959, homestead entry.

The State made a further amendment to its application on January 2, 1979, and top filed under ANILCA on February 25, 1982. However, the 1979 amendment was made long after the December 18, 1971, deadline for statutory approval of pending Native allotment applications. The effect of the top filing amendment is discussed below.

[3] We now turn to the question of whether the 1982 refiling of the 1960 and 1962 State selections would include the lands described in the Barlip application, which were not vacant, unappropriated, or unreserved when the 1960 and 1962 applications were filed.

Section 906(e) of ANILCA, 43 U.S.C. § 1635(e) (1982), permits the State to

> file future selection applications and amendments thereto * * * for lands which are not, on the date of filing of such applications, available [for selection under the Alaska Statehood Act]. Each such selection application, if otherwise valid, shall become an effective selection * * * upon the date the lands become available within the meaning of [the Alaska Statehood Act] regardless of whether such date occurs before or after expiration of the State's land selection rights. Selection applications heretofore filed by the State may be refiled so as to become subject to the provisions of this subsection; except that no such refiling shall prejudice any claim of validity which may be asserted regarding the original filing of such application. [Emphasis added.]

On February 25, 1982, the State refiled its selection applications to take advantage of the provisions of section 906(e) of ANILCA. This section of ANILCA amended the Statehood Act to permit the State to file a new application and amendments thereto, and refile a previously filed application to include lands which were not vacant, unappropriated, and unreserved at the time the section 906(e) top filing application, amendment, or refiling was submitted. Section 906(e) provides that the State selection applications, amendments thereto, and refiled applications shall become an effective selection upon the date the lands become available within the meaning of the Alaska Statehood Act. 7/ The lands subject to the Barlip application were not available for selection under the Alaska Statehood Act when the 1960 and 1962 applications were refiled. The February 1982 State selection, made under section 906(e) by refiling selection application A-051107, would incorporate the lands in question only if the lands became available for selection within the meaning of the Alaska Statehood Act on or after February 25, 1982. However, they did not become available and were not incorporated in the application.

The exception to the congressional conveyance of lands subject to Native allotment applications found at section 905(a)(4) of ANILCA, 43 U.S.C. § 1634(a)(4) (1982), would preclude automatic conveyance and require adjudication of the Barlip Native allotment application pursuant to the Act of May 17, 1906, if the State could be deemed to have selected the land prior to December 18, 1971. However, we can find no basis for this finding. In this case, the lands subject to Barlip's application can only be deemed to have become subject to the State applications after December 18, 1971.

Having found that the State did not select the land subject to the Barlip conveyance prior to December 18, 1971, the exception to the legislative conveyance provision contained in section 905(a)(4) of ANILCA, 43 U.S.C. § 1634(a)(4) (1982), is not applicable, and her Native allotment application is subject to the legislative conveyance provision of section 905 of ANILCA.

[4] The State challenges the adequacy of the evidence underlying the BLM determination that Barlip had complied with the provisions of the Allotment Act. However, her allotment application was pending on December 18, 1971, and we have no basis for a finding that, by reason of the exceptions to the legislative conveyance, her application must be adjudicated pursuant to the requirements of the Act of May 17, 1906, as amended. As there is no basis for a finding that her Native allotment application had not been legislatively approved, there can be no challenge to the adequacy of the evidence underlying the BLM determination that Barlip had complied with the provisions of the Allotment Act.

7/ Although it is not conclusive, the heading of this paragraph does shed light on the Congressional intent. This heading states: "(e) Future 'top filings.'" (Emphasis added.)

Accordingly, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision appealed from is affirmed as modified.

R. W. Mullen
Administrative Judge

I concur:

David L. Hughes
Administrative Judge